

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 HAROLD A. GUSTAFSON,

9 *Petitioner,*

10 vs.

11 BRIAN E. WILLIAMS, *et al.*

12 *Respondents.*
13
14

2:09-cv-01225-KJD-LRL

ORDER

15 This represented habeas matter under 28 U.S.C. § 2254, which was transferred from
16 this District to the District of Minnesota, comes before the Court on petitioner's motion (#24)
17 under Rule 60(b) or in the alternative Rule 6(b). Petitioner does not seek rehearing on the
18 underlying transfer order *per se*. Rather, petitioner requests that the Court "set aside its order
19 and reissue it," #24, at 7, so that petitioner will have another opportunity to seek a permissive
20 interlocutory appeal under 28 U.S.C. § 1292(b) within ten days as provided for previously in
21 the prior order (#22). Petitioner took no action in response to the prior order within the ten-
22 day period for applying to the Court of Appeals under § 1292(b), and the matter thereafter
23 was transferred to the District of Minnesota.

24 ***Background***

25 Petitioner Harold Gustafson seeks to challenge his Minnesota state judgment of
26 conviction for first degree murder. He has been incarcerated in Nevada, however, on behalf
27 of Minnesota authorities pursuant to an interstate corrections compact. This case does not
28 involve a detainer or any other claim involving future custody. Petitioner instead has been

1 held in current physical custody on the Minnesota judgment of conviction, albeit by Nevada
2 authorities as agents for Minnesota authorities rather than directly by Minnesota authorities.

3 By an order (#21) entered on May 10, 2010, the Court granted respondents' motion
4 to transfer the action to the District of Minnesota. The Court certified the order, however, for
5 a possible permissive interlocutory appeal to the Court of Appeals under 28 U.S.C. § 1292(b),
6 contingent upon petitioner making a timely application within ten days of the order to the Court
7 of Appeals for permission to pursue the interlocutory appeal. In the meantime, the transfer
8 under the order was not immediately effective. The Court instead directed the Clerk to
9 transfer the case to the District of Minnesota no earlier than: (a) forty-five (45) days following
10 entry of the order; or (b) if timely application was made for permission to appeal the order,
11 thirty (30) days following receipt of the mandate or other final order from the Court of Appeals,
12 subject to the order on the appeal by the Court of Appeals and/or any order regarding a
13 further stay of proceedings.

14 No application was made thereafter to the Ninth Circuit for permission to pursue a
15 permissive interlocutory appeal under § 1292(b).

16 Accordingly, on June 28, 2010, the Clerk of this Court transferred the matter to the
17 District of Minnesota. #22.

18 Critically, on June 29, 2010, the Clerk of this Court received, filed and entered the
19 transmittal return from the Clerk of Court for the District of Minnesota advising that the case
20 had been docketed in that Court as No. 0:10-cv-02732.

21 A month later, on July 29, 2010, petitioner filed the present motion seeking in essence
22 for this Court to recertify the matter for an interlocutory appeal under § 1292(b).

23 Petitioner relies upon the following. The e-mail address given to the Clerk of this Court
24 for notices of electronic filing was counsel's professional website address. Counsel asserts
25 in the unsworn motion that "unbeknownst" to him, the e-mails then were forwarded from the
26 professional web site to his personal e-mail account. He maintains that his office changed
27 to a different professional website in approximately April 2010. Counsel did not provide the
28 Clerk with an updated e-mail address after the change. Counsel states that he was of the

1 belief that his e-mail address with the Clerk was established through his own personal e-mail
 2 address rather than that from the old professional website. Counsel asserts that the present
 3 case is his only federal case, such that he was not aware that he was not receiving notices
 4 sent from the Clerk. He maintains that he first learned of the transfer on July 16, 2010, when
 5 he received correspondence from the transferee court in the District of Minnesota.

6 ***Discussion***

7 It is well- and long-established law that the docketing of a transferred case in an out-of-
 8 circuit transferee court terminates the jurisdiction of both the transferor court and the
 9 corresponding court of appeals. *See, e.g., NBS Imaging Systems, Inc. v. United States*
 10 *District Court*, 841 F.2d 297, 298 (9th Cir. 1988); *Lou v. Belzberg*, 834 F.2d 730, 733 (9th Cir.
 11 1987); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* §
 12 3846 (3rd ed. 2010). This Court accordingly structured its prior order in the fashion that it did.
 13 The Court delayed the actual transfer until petitioner had an opportunity to apply for
 14 permission to pursue a § 1292(b) appeal as per the Court's certification. When the case
 15 thereafter was transferred to and docketed in the transferee court after petitioner failed to
 16 pursue such an appeal, any potential jurisdiction in either this Court or the Ninth Circuit with
 17 respect to such a § 1292(b) appeal was terminated. This Court therefore has no jurisdiction
 18 to grant the relief requested.¹

19
 20 ¹ This Court defers to the Ninth Circuit with regard to the determination of its own jurisdiction. The
 21 statement in the text with regard to appellate jurisdiction, however, would appear to be well-established under
 22 Ninth Circuit authority.

23 This Court would reach the same conclusion as in the text with regard to its own lack of jurisdiction
 24 even if the Court were to view habeas transfer rules as arising *sui generis* rather than under 28 U.S.C. §
 25 1404(a). *Cf. #21*, at 5 n.6 (discussing possibility that habeas transfer rules arise *sui generis* rather than under
 26 § 1404(a)). Nothing of substance would be gained in the administration of justice generally by treating the
 27 jurisdictional effect of the docketing of the case in the transferee court differently on a habeas transfer than on a
 28 § 1404(a) transfer (if distinct from habeas transfer in the first instance). A proliferation of exceptions and
 distinctions of questionable value in jurisdictional analysis is not to be encouraged. *Cf. Hertz Corp. v. Friend*,
 130 S.Ct. 1181, 1193 (2010) (discussing the value of simple and predictable jurisdictional rules); *Grupo*
Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 582, 124 S.Ct. 1920, 1930, 158 L.Ed.2d 866 (2004)
 (rejecting proposed deviation from a long-established jurisdictional rule in favor of maintaining a clear and
 certain jurisdictional rule). At some point, every issue has to come to a close, particularly issues pertaining
 (continued...)

1 Even if the Court were to assume, *arguendo*, that it had jurisdiction to consider the
2 motion, the Court is not inclined to grant the motion in the exercise of its discretion.

3 Petitioner invokes Rule 60(b) and 6(b) of the Federal Rules of Civil Procedure. Neither
4 rule is applicable in this procedural context.

5 Rule 60 addresses motions seeking relief from a final judgment or order. The Court
6 did not enter a final judgment or order. It instead entered an interlocutory order transferring
7 the case. The rule as to that type of order is that the district court has no jurisdiction to
8 reconsider the order after the case has been docketed in the transferee court. Rule 60(b) has
9 no application here.

10 Rule 6(b)(1)(B) allows for the extension of an expired deadline if a party failed to act
11 because of excusable neglect. Under Rule 1, the Federal Rules of Civil Procedure govern
12 proceedings in the district courts. Rule 6(b) is not a rule governing the extension of time for
13 pursuing an appeal, whether under § 1292(b) or otherwise. Rule 6(b) thus also has no
14 application here.

15 The Ninth Circuit's decision in *In re Benny*, 812 F.2d 1133 (9th Cir. 1987), instead
16 states the rule of law applicable to this situation when jurisdiction is present. The Ninth Circuit
17 noted that Rule 26(b) barred the Court of Appeals from extending the ten-day time limit. 812
18 F.2d at 1136. The appellate court then considered whether a district court nonetheless could
19 in effect extend the time limit by recertifying its order, in a context where the district court
20 otherwise had not lost jurisdiction over the case.

21 *Benny* rejected a rigid rule where the district court could not recertify the order if
22 counsel's neglect caused the failure to timely seek permission. 812 F.2d at 1136.

23 *Benny* also rejected a flexible rule that allowed recertification "even though counsel's
24 neglect caused the failure to file a timely petition after the original recertification." The Ninth

25
26 ¹(...continued)
27 only to forum rather than substance. The docketing of the transferred case in the transferor court constitutes
28 a clear and sensible point at which to draw the jurisdictional line terminating the authority of the transferor
court over the case both in habeas as well as on a § 1404(a) transfer (if distinct from habeas transfer in the
first instance).

1 Circuit concluded that decisions from other circuits taking this approach “go too far in the
 2 other direction” and “effectively *eliminate* the ten-day jurisdictional limit completely by allowing
 3 apparently uncontrolled and repeated recertifications.” 812 F.2d at 1137 (emphasis in
 4 original).

5 *Benny* instead took what the Ninth Circuit described as the “middle road” adopted by
 6 the Seventh Circuit in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981):

7
 8 In *Nuclear Engineering*, the Seventh Circuit held that the
 9 critical inquiry is whether recertification advances the purposes of
 10 section 1292(b). If recertification will foster judicial efficiency and
 11 the district court recertifies the order, then the appellate court
 12 ought not to deny review solely because the petitioner failed to
 13 take advantage of the original certification. We therefore hold
 14 that if, as in this case, a district court on reconsideration
 15 recertifies for interlocutory appeal an order that was previously
 16 certified for appeal but from which the appellant failed to timely
 17 petition to appeal, the court of appeals may exercise jurisdiction
 18 over the appeal if it determines that jurisdiction over the appeal
 19 would serve judicial efficiency.

20 812 F.2d at 1137.²

21 In the present case, the Court does not find that recertification would foster judicial
 22 efficiency. The case now is lodged in the transferee court. To grant recertification at this
 23 point, the Court would be acting in a context where the issue of whether it now has jurisdiction
 24 in the first instance to take action in the transferred case overshadows the issue as to which
 25 it first certified the case for appeal. The case would have to be re-transferred back to this
 26 Court, a recertification of the prior order made, and then permission applied for in the Court
 27 of Appeals. Particularly in a habeas case, as elaborated upon below, the interlocutory appeal
 28 on the question of whether there was authority to transfer the action was one that needed to
 be pursued expeditiously rather than after the transfer became effective.

In this regard, the Court notes that resolution of the underlying question at issue in
Benny was critical to the adjudication of all bankruptcy cases. The issue literally went to the

² See also *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 159-62, 104 S.Ct. 1723, 1730-31, 80 L.Ed.2d 196 (1984)(Stewart, J., dissenting as to other issues)(related discussion); 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3929, at nn. 70-71.7 (2d ed. 2010).

1 constitutionality of the entire bankruptcy judicial system following upon the decision in
2 *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858,
3 73 L.Ed.2d 598 (1982). Here, in contrast, the issue of the district court's authority to transfer
4 the action in the context presented, while significant, is not one that affects every habeas
5 matter brought. The issue will arise again in another case in due course, and the question
6 and transfer order potentially can be certified for a permissive interlocutory appeal in such a
7 later case, depending upon the case law at that time.³

8 Moreover, the Court makes no implicit or tacit holding that counsel's failure to timely
9 seek permission to pursue an interlocutory appeal was due to excusable neglect. Whether
10 counsel has one federal case or a thousand, it is his obligation to provide the Clerk with an
11 e-mail address for the electronic docketing system at which he will receive the notices of
12 electronic filing. The Clerk sent the notice of electronic filing to the e-mail address given by
13 counsel. Regardless of what counsel's office did thereafter with the notice sent to that
14 address in regard to forwarded e-mails and/or what counsel knew about what *his* office was
15 doing with the e-mail, the obligation to provide a viable, working e-mail address remained with
16 counsel. Moreover, it is basic common sense following a web or physical address move to
17 ensure that e-mail or physical mail is properly forwarded thereafter. Counsel did not provide
18 an updated e-mail address to this Court after the website change, and counsel had given the
19 prior *office* e-mail address, not his personal e-mail address, to the Clerk of this Court.

20 At bottom, it is counsel's responsibility to provide the Clerk with a working and current
21 e-mail address at which he will receive notices of electronic filing. If counsel fails to provide
22 the Clerk with an e-mail address at which he actually will receive the notices and/or fails to
23 update the e-mail address on file after a web move, the failure to receive notices from the
24

25 ³The Court additionally notes that petitioner perhaps misunderstands the prior order in stating that the
26 Court "clearly expressed . . . that it felt it was, perhaps, in the woods on the issue." #26, at 6. The Court has
27 full confidence in the correctness of its ruling. The standard for certifying a case for a potential permissive
28 interlocutory appeal is whether, *inter alia*, the order involves a controlling question of law as to which there is
substantial ground for difference of opinion. The Court was not "punting" on an issue that it could not resolve
but instead was certifying an order for possible appeal as to which there was substantial room for argument.

1 Court is not a matter of isolated inadvertence. Rather, the failure to receive notices instead
2 is a foreseeable consequence of failing to provide a viable and/or properly updated e-mail
3 address to the Clerk. *Cf. Nuclear Engineering*, 660 F.2d at 248 (taking into account that the
4 failure to timely seek permission was due to a not unreasonable reading of the statute).

5 The Court further finds that respondents will sustain not insignificant prejudice if it were
6 to seek to recertify the order for a permissive interlocutory appeal following the completed
7 transfer of the case. A federal habeas matter is not ordinary civil litigation. A federal habeas
8 matter instead presents a collateral attack to a presumptively valid state court judgment of
9 conviction. Interests of speedy and final adjudication are particularly strong where collateral
10 attacks on state court judgments of conviction are involved, due to the interests of comity and
11 federalism implicated by federal judicial review of state court convictions. As a result, there
12 is a significant interest in expeditious adjudication of issues in federal habeas cases, for the
13 respondents as well as for the petitioner. *See, e.g., Day v. McDonough*, 547 U.S. 198, 208,
14 126 S.Ct. 1675, 1683, 164 L.Ed.2d 376 (2006); *Rhines v. Weber*, 544 U.S. 269, 276-78, 125
15 S.Ct. 1528, 1534-35, 161 L.Ed.2d 440 (2005). Now that this case is lodged in the District of
16 Minnesota following the completed transfer, these interests counsel against now fanning life
17 back into the otherwise closed forum issue and in favor of proceeding forward to a resolution
18 of the case.

19 Finally, petitioner includes in his argument on the procedural issue an appeal to justice
20 based upon the assertion that an innocent man has been convicted unconstitutionally. He
21 states that he “believes that he cannot get a fair hearing in Minnesota.”⁴ He does so in
22 arguing a standard applicable to a Rule 60(b) motion that has no relevance to the current
23 issue. In all events, this Court has every confidence that the District of Minnesota will be as
24 fully vigilant as this Court would have been in considering petitioner’s constitutional claims,
25 subject to the particular procedural and merits issues potentially presented in this case. The
26 question of which federal forum those issues will be resolved in has nothing to do either with
27

28 ⁴#24, at 4.

1 the merits of the case or the quality of the consideration that petitioner's case then will
2 receive.

3 IT THEREFORE IS ORDERED that petitioner's motion (#24) under Rule 60(b) or in the
4 alternative Rule 6(b) is DENIED.

5 The Clerk of this Court shall forward a supplemental transmittal or notice of electronic
6 filing reflecting this order to the Clerk of Court for the District of Minnesota, in a manner
7 consistent with the Clerk's current practice for such matters.

8 DATED: October 25, 2010

9
10 

11

KENT J. DAWSON
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28